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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH T. GRIFFIN,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A04-0609-CR-525

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William H. Albright, Judge
Cause No. 71D01-0103-CF-108

March 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Kenneth Griffin appeals from the trial court's denial of his Belated Motion to Correct Error. He presents three issues for our review, but, as the State points out in its cross-appeal, we are without jurisdiction to consider Griffin's appeal.

We dismiss.

FACTS AND PROCEDURAL HISTORY

On May 11, 2001, Griffin pleaded guilty to Resisting Law Enforcement, as a Class B felony, and Auto Theft, as a Class D felony. The plea agreement left sentencing open to the trial court's discretion. Following a sentencing hearing, the trial court imposed the maximum sentence on both counts, to run consecutively, for a total term of twenty-three years. Griffin did not file a motion to correct error or a notice of appeal within thirty days.

On February 27, 2003, Griffin filed a pro se petition for post-conviction relief, and on March 5, 2003, the trial court appointed a public defender to represent Griffin. No further action was taken until March 4, 2005, when the trial court granted Griffin's motion to dismiss his petition for post-conviction relief without prejudice.

On August 18, 2006, Griffin, by counsel, filed a belated motion to correct error pursuant to Indiana Trial Rule 59. Griffin did not request permission to file that motion pursuant to Indiana Post-Conviction Rule 2(2). Nevertheless, the trial court "allowed" the belated motion, but denied the motion on its merits. Appellant's App. at 31. This appeal ensued.

DISCUSSION AND DECISION

Generally, the trial court has discretion in permitting a belated motion to correct error and its decision will not be disturbed unless an abuse of discretion is shown. Tolson v. State, 665 N.E.2d 939, 942 (Ind. Ct. App. 1996). Here, however, Griffin did not request permission to file a belated motion to correct error pursuant to Post-Conviction Rule 2(2), which provides:

Any eligible defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion to correct error addressing the conviction, where:

- (a) no timely and adequate motion to correct error was filed for the defendant;
- (b) the failure to file a timely motion to correct error was not due to the fault of the defendant; and
- (c) the defendant has been diligent in requesting permission to file a belated motion [to correct] error under this rule.

The trial court shall not consider the merits of the motion, but shall determine whether there are grounds for allowing the belated motion to correct error to be filed. . . .

If the trial court finds no such grounds, it shall deny defendant permission to file the motion. . . .

Because Griffin did not request permission to file the belated motion, he did not present evidence on any of the elements of Post-Conviction Rule 2(2), and the trial court did not make the requisite determination under the rule. The record before us is silent regarding whether Griffin was at fault in failing to file a timely motion and whether he was diligent in requesting permission to file a belated motion. As the State points out, Griffin filed a petition for post-conviction relief in 2003, and the trial court appointed a

public defender to represent him at that time. There is no explanation for his having waited until 2006 to file a belated motion to correct error.

We hold that the trial court erred when it ruled on Griffin's belated motion to correct error without Griffin first having requested permission to file the motion and without the court having made the requisite determination under Post-Conviction Rule 2(2). Thus, we dismiss Griffin's appeal for lack of jurisdiction. See, e.g., Townsend v. State, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006) (dismissing appeal of trial court's ruling on request for permission to file belated notice of appeal where defendant had not presented any evidence on the two elements of P-C.R. 2(1)) trans. denied.

Dismissed.

MAY, J., and MATHIAS, J., concur.